

**IN THE COURT OF COMMON PLEAS OF LYCOMING COUNTY, PENNSYLVANIA**

<b>COMMONWEALTH OF PENNSYLVANIA,</b>	:	
	:	
<b>v.</b>	:	<b>No. 256-2008</b>
	:	<b>CRIMINAL DIVISION</b>
<b>ARNELL MONROE,</b>	:	
<b>Defendant</b>	:	<b>PCRA</b>

**OPINION AND ORDER**

Following a Court Conference with both parties on the Defendant's Post Conviction Relief Act (PCRA) Petition, the Court concluded that the issues raised in the Petition did not merit an evidentiary hearing. As such, this Opinion addresses the issues raised in the Petition.

***Factual Background***

The relevant facts, as stated in the Trial Court's November 9, 2008 Opinion, are as follows. Around 8:00 p.m. on January 30, 2008, Officer Reeder (Reeder) and Sergeant Miller (Miller) of the Williamsport Bureau of Police were on stationary patrol working for the Special Operations Group in an area well known for heavy drug and prostitution activity. The officers observed the Defendant engage in an exchange with a black male and a black female, and then observed the Defendant walk south in the direction of the officers. The officers watched the Defendant reach into his coat and throw something white onto the ground, at which point the officers yelled for the Defendant to stop so that they could investigate what was thrown. When the Defendant kept his hands inside his coat pockets after the officers repeatedly demanded that he stop, the officers became fearful for their safety and took the Defendant to the ground at gun point. Following a pat down search of the Defendant's person, the officers found three sandwich bags tied in knots in the corners. The Defendant was then placed under arrest and a search

incident to arrest revealed a cell phone, two \$20.00 bills, and three sandwich bags tied in knots containing suspected cocaine. The officers then recovered the object which the Defendant threw, which was found to be two additional sandwich bags containing a white substance. The bags found on the Defendant's person as well as the bags he discarded were found to contain a total of 8.1 grams of cocaine with 6.8 grams of powder cocaine and the rest crack cocaine. Following his arrest, the Defendant was taken to City Hall where a booking process was completed. As part of the booking process, Reeder asked the Defendant if he was addicted to narcotics and if he was under the influence of any narcotics, to which the Defendant responded in the negative. During the booking process the Defendant also reported that he was unemployed. On January 31, 2008, the police charged the Defendant with Possession with Intent to Deliver, Possession of a Controlled Substance, and Possession of Drug Paraphernalia. During the Defendant's jury trial, which was held before this Court on September 5, 2008, the Commonwealth presented the expert testimony of Sergeant McKenna (McKenna). McKenna testified that he read the reports written by Reeder and Miller and looked at all of the evidence to reach his conclusion that the evidence was sufficient to be consistent with possession with the intent to deliver. He concluded that the amount of cocaine possessed, the way it was packaged, the lack of paraphernalia used for ingestion on the Defendant's person, the fact that he carried a cell phone and two \$20.00 bills, all supported his professional opinion that the drugs were possessed with intent to deliver. McKenna also stated that he found significant that the Defendant was unemployed and told the police that he was neither under the influence of narcotics nor addicted to narcotics. McKenna further stated that the fact that the Defendant was found carrying both crack cocaine and powder cocaine was indicative of possession with intent to deliver. Following the jury trial, the Defendant was found guilty of two counts of Possession of a Controlled Substance and one count

Possession of Drug Paraphernalia and was sentenced to state incarceration for forty (40) months to ten (10) years effective January 30, 2008<sup>1</sup>.

### ***Procedural Background***

The Defendant filed an appeal from the judgment of sentenced entered against him, which the Superior Court affirmed via an Opinion dated July 10, 2009. On June 30, 2010, the Defendant filed a pro-se PCRA Petition; thereafter, Edward J. Rymsza, Esquire, was appointed as Defense Counsel. After several extensions of time, Defense Counsel filed an Amended PCRA Petition on August 5, 2011. After a Court Conference on the Amended Petition, the Court determined that an evidentiary hearing was not needed and will therefore address the merits of the issues raised in the Petition in this Opinion.

In the Amended Petition, Defense Counsel raises several allegations of ineffective assistance of counsel: 1) trial counsel was ineffective for failing to object to Reeder's testimony regarding the Defendant's booking sheet answers; 2) ineffectiveness of trial counsel for raising an oral motion in limine on the morning of trial regarding the preclusion of Miller's PWID expert testimony; 3) ineffectiveness of trial counsel for failure to object to the Commonwealth's prejudicial closing argument; 4) ineffectiveness of trial counsel for failure to object to and/or file an appropriate motion regarding the PWID expert testimony of Sergeant McKenna; and 5) ineffectiveness of appellate counsel for failing to raise/litigate these issues.

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<sup>1</sup> As the Defendant is currently serving a sentence of imprisonment, probation or parole for the crime, the Court finds it has jurisdiction to hear this case pursuant to 42 Pa.C.S. §9544(a)(1)(i). See Commonwealth v. Ahlborn, 683 A.2d (Pa. Super. 1996) where the Superior Court determined that the "currently serving" requirement of Pa.C.S. §9544(a)(1)(i) is determined at the time the petition is filed, and that even where a petition is filed prior to the petitioner's release from custody, the petition is rendered moot by the defendant's subsequent unconditional release.

In order to establish a claim for ineffective assistance of counsel, a petitioner must establish:

(1) the underlying claim has arguable merit; (2) no reasonable basis existed for counsel's actions or failure to act; and (3) petitioner suffered prejudice as a result of counsel's error such that there is a reasonable probability that the result of the proceeding would have been different absent such error.

Commonwealth v. Reed, 971 A.2d 1216, 1221 (2009). See Commonwealth v. Pierce, 527 A.2d 973 (1987).

### *Discussion*

#### ***Trial counsel was ineffective for failing to object to Officer Reeder's testimony regarding the Defendant's booking sheet answers***

The Defendant contends that trial counsel was ineffective for failing to object to Reeder's testimony regarding the Defendant's booking sheet answers, specifically his answers stating that he was not addicted to drugs and that he was unemployed.

The Court first notes that trial counsel did in fact object to Reeder's testimony regarding the Defendant's booking sheet answers at the time of the Suppression Hearing held on July 29, 2008. N.T., 7/29/08, p. 3. The Court also finds that the Court's denial of the Suppression Motion was already addressed by the Superior Court in its July 10, 2009 Opinion. Although trial counsel and the Superior Court only addressed the issue as it relates to the Defendant's answers concerning his drug addiction, the Court finds that the Superior Court's reasoning in its decision to affirm this Court's denial of the Suppression Motion applies to the Defendant's answers regarding unemployment as well.

The Superior Court determined that "[a]lthough police label questions as 'routine booking questions' asked to determine the need for medical assistance, Appellant's answers to

the questions were particularly likely to elicit relevant, incriminating responses.”

Commonwealth v. Monroe, No. 1691 MDA 2008, slip op. at 15-25 (Pa. Super. July 10, 2009) (See Pennsylvania v. Muniz, 110 S.Ct. 2638, 2643-44 (1990)). However, the Superior Court concluded that although the Defendant should have been given Miranda rights before he was asked the questions included within the booking sheets, the error was harmless. “[A]fter careful review of the entire record, we are convinced beyond a reasonable doubt, the overwhelming, independent, competent, and uncontradicted evidence presented at trial showed Appellant possessed the drugs with the intent to deliver.” Monroe at 24-25. The Superior Court cited to the following evidence in support of their conclusion:

Appellant did not contest he had possessed two baggies each containing approximately 3.5 grams of cocaine, and three baggies containing a total of 1.3 grams of cocaine. Further, police apprehended Appellant in an area known for high drug activity, police observed Appellant making what appeared to be a drug exchange with two other individuals, and Appellant ignored police commands to stop. Additionally, when asked at trial about indicators showing Appellant possessed the drugs with the intent to deliver, the Commonwealth’s expert noted Appellant discarded two bags each containing eight balls of cocaine, Appellant possessed three half-gram bags of cocaine on his person, police located the drug bags in different locations, and the packaging of the drugs in general. Appellant possessed drug distributing paraphernalia, a cell phone, cash, but carried no drug paraphernalia to suggest the narcotics in his possession were for personal use.

Monroe at 24.

As trial counsel did in fact request the suppression of the Defendant’s answers to the booking sheet questions, and as the Superior Court has already affirmed this Court’s denial of the Defendant’s Suppression Motion by concluding that the admission of the Defendant’s statements was harmless error, the Court determines that the Defendant’s argument on this issue is without merit as it fails the third element needed to prove ineffective assistance of counsel.

***Ineffectiveness of trial counsel for raising an oral motion in limine on the morning of trial regarding the preclusion of Officer Miller's PWID expert testimony***

The Defendant contends that trial counsel was ineffective for raising an oral motion in limine on the morning of trial regarding the preclusion of Officer Miller's PWID expert testimony as said motion placed the Commonwealth on notice and allowed the Commonwealth time to find a substitute PWID expert. The Defendant contends that the substitute testimony of McKenna provided the Commonwealth with the evidence needed to prove the charge of PWID.

The court in Commonwealth v. Padilla, 923 A.2d 1189 (Pa. Super. 2007) provides a thorough description of the purpose of a motion in limine:

A motion in limine is a pre-trial application before a trial court made outside the presence of a jury, requesting a ruling or order from the trial court prohibiting the opposing counsel from referring to or offering into evidence matters so highly prejudicial to the moving party that curative instructions cannot alleviate an adverse effect on the jury. The purpose of a motion in limine is two fold: 1) to provide the trial court with a pre-trial opportunity to weigh carefully and consider potentially prejudicial and harmful evidence; and 2) to preclude evidence from ever reaching a jury that may prove to be so prejudicial that no instruction could cure the harm to the defendant, thus reducing the possibility that prejudicial error could occur at trial which would force the trial court to either declare a mistrial in the middle of the case or grant a new trial at its conclusion. Further, a ruling on a pre-trial motion in limine provides counsel with a basis upon which to structure trial strategy. The motion in limine is an effective procedural device with no material downside risk. Once the court has pronounced its decision, the matter before it will proceed unless the Commonwealth elects to appeal an adverse ruling.

See Commonwealth v. Noll, 662 A.2d 1123, 1125 (Pa. Super. 1995). Furthermore, Pennsylvania Rule of Criminal Procedure 580 provides that “[u]nless otherwise provided in these rules, all pretrial motions shall be determined before trial. Trial shall be postponed by the court for the determination of pretrial motions, if necessary.”

The Court finds that trial counsel's use of a motion in limine to request the preclusion of Miller's testimony was completely appropriate. Trial counsel's request before trial, rather than

during the middle of Miller's testimony, was considerate to both the Commonwealth and the Court, and was helpful in providing the efficient administration of justice to the Defendant. Trial counsel explained her decision to request the motion in limine before trial:

MS. SPRING: I actually had an oral motion in limine to preclude Sergeant Miller from testifying as an expert witness in this case...It's my understanding, and, I believe since he's the only one here, although someone could be arriving to testify as an expert independently that the Commonwealth would intend to call him as an expert and rather than objecting to that in the middle of his testimony I thought we could address that ahead of time.

N.T., 9/5/08, p. 3. Trial counsel's courteous pre-trial motion in limine is exactly the kind of representation the Court believes that all counsel should provide; an advocate for one's client while remaining respectful of the other parties involved and adherent to the rules. While it is true that the Commonwealth was able to present the testimony of McKenna in the place of Miller, the Court does not find that this was due to any ineffectiveness on the part of trial counsel. As the Defendant is unable to prove the first element needed to establish ineffective assistance of counsel, the Court finds this issue to be without merit.

***Ineffectiveness of trial counsel for failure to object to the Commonwealth's prejudicial closing argument***

The Defendant argues that trial counsel was ineffective for failing to object to the Commonwealth's prejudicial closing argument. The Defendant contends that the Commonwealth's closing argument was prejudicial as the Commonwealth appealed to community sentiment and/or civic duty, vouched for police credibility, and cited to the Defendant's unemployment status and failure to testify. Specifically, the Defendant cites to the following statements: "[w]e have a problem here in Williamsport....we got a drug problem"

N.T., 9/5/08, p. 9-10. [The drug users] "are members of the community just like you are." N.T.,

9/5/08, p. 11. “[H]e’s not working.” N.T., 9/5/08, p. 11. “[Y]ou’re looking at what goes on in the city streets and he was caught. The police did their job....They’ve been doing it a long time. They don’t jump to conclusions.” N.T., 9/5/08, p. 13. “Sgt. Miller is telling the truth. Sgt. Miller was telling the truth.” N.T., 9/5/08, p. 17. “[I]f you do you’re going to find out this isn’t a guy that was just there for personal use or he would have said so.” N.T., 9/5/08, p. 17.

It is well settled that “[i]n reviewing prosecutorial remarks to determine their prejudicial quality, comments cannot be viewed in isolation but, rather, must be considered in the context in which they were made.” Commonwealth v. Judy, 978 A.2d 1015, 1020 (Pa. Super. 2008) (See Commonwealth v. Sampson, 900 A.2d 887, 890 (Pa. Super. 2006)). “Our review of prosecutorial remarks and an allegation of prosecutorial misconduct requires us to evaluate whether a defendant received a fair trial, not a perfect trial. Judy at 1020. See Commonwealth v. Rios, 721 A.2d 1049, 1054 (Pa. 1998). The American Bar Association (ABA) Standards Section 3-5.8 provides the following relating to argument to the jury:

- (a) The prosecutor may argue all reasonable inferences from evidence in the record. It is unprofessional conduct for the prosecutor intentionally to misstate the evidence or mislead the jury as to the inferences it may draw.
- (b) It is unprofessional conduct for the prosecutor to express his personal belief or opinion as to the truth or falsity of any testimony or evidence or the guilt of the defendant.
- (c) The prosecutor should not use arguments calculated to inflame the passions or prejudices of the jury.
- (d) The prosecutor should refrain from argument which would divert the jury from its duty to decide the case on the evidence, by injecting issues broader than the guilt or innocence of the accused under the controlling law, or by making predictions of the consequences of the jury’s verdict.

Furthermore, “[i]t is also well settled that:

[a] prosecutor has considerable latitude during closing arguments and his arguments are fair if they are supported by the evidence or use inferences that can



reasonably be derived from the evidence. Further, prosecutorial misconduct does not take place unless the unavoidable effect of the comments at issue was to prejudice the jurors by forming in their minds a fixed bias and hostility toward the defendant, thus impeding their ability to weigh the evidence objectively and render a true verdict. Prosecutorial misconduct is evaluated under a harmless error standard.

Judy at 1020. (quoting Commonwealth v. Holley, 945 A.2d 241, 250 (Pa. Super. 2008)).

The Court has reviewed the Commonwealth's closing argument, paying close attention to the statements cited by Defense Counsel as prejudicial, and can find no statement which would have had the unavoidable effect of prejudicing the jurors by forming in their minds a fixed bias and hostility toward the Defendant which impeded the jurors ability to weigh the evidence objectively and render a true verdict. The only statement which the Court believes deserves further analysis is the Commonwealth's statement during closing argument which Defense Counsel argues essentially vouched for police credibility. The Court finds that the above statement relating to Miller's truthfulness was taken out of context. During trial, Miller testified to the following regarding his encounter with the Defendant:

Basically he at first adamantly denied that he threw the items onto the ground and I let him know that I observed him actually throw them onto the ground at which point he told me Sergeant Miller, I'm not going to call you a liar. That was pretty much the end of that discussion.

N.T., 9/5/08, p. 78. Then during closing argument, the Commonwealth made the following statement:

When you came through that security downstairs, went through that metal detector, one thing that won't take is your common sense. It will not take that from you. Use it. Put all the pieces together and if you do you're going to find out this isn't a guy that was just there for personal use or he would have said so. That's personal use. He never said any of that. But I would submit this. When he first denied that he threw down the two bags and remember Sgt. Miller told you when he approached he said I didn't throw down any two bags, remember he said that, and Sgt. Miller said that I saw you throw down those two bags and he says, and what is his response? I'm not going to call you a liar Sgt. Miller. Sgt. Miller is telling the truth. Sgt. Miller was telling the truth.

N.T., 9/5/08, p. 17. When read in context, however, it is clear to the Court that the Commonwealth was not assuring the jury that Miller was telling the truth, but was asking the jury to use their common sense to determine whether or not they believed Miller's testimony, and furthermore, the Commonwealth was only repeating a segment of Miller's own testimony and then drawing an inference from said testimony, which is permissible. As the Defendant cannot prove the first element needed to establish ineffective assistance of counsel, the Court finds this argument is without merit as well.

***Ineffectiveness of trial counsel for failure to object to and/or file an appropriate motion regarding the PWID expert testimony of Sergeant McKenna***

The Defendant contends that trial counsel was also ineffective for failure to object and/or file an appropriate motion regarding the PWID expert testimony of McKenna where such testimony violated the notice and expert report rules set forth in Rule 573 of the Pennsylvania Rules of Criminal Procedure.

The Pennsylvania Rules of Criminal Procedure do not require that an expert report be prepared and provided to the defense; the rules merely provide the Court with the discretion to order such a report be prepared upon motion. Pa. R. Crim. P. 573(2)(b). Furthermore, the Defense was already aware that the Commonwealth planned to call at least one witness, Miller, to present testimony concerning PWID, and the Defense admitted, as stated above, that they were not entirely certain if Miller was the Commonwealth's only witness on this subject or not. N.T., 9/5/08, p. 3. The Court finds, the Rules of Criminal Procedure aside, that trial counsel did in fact have adequate notice that the Commonwealth intended to present PWID expert testimony.

As the Defendant can again not prove the first element needed to establish ineffective assistance of counsel, the Court finds that this argument is without merit.

***Ineffectiveness of appellate counsel for failing to raise/litigate these issues***

The Defendant contends that appellate counsel was ineffective for failing to raise the above issues on appeal. As the Court has determined that the above issues are without merit, the Court cannot find that appellate counsel was ineffective for failing to raise said issues on appeal. Therefore, the Court finds this issue to also be without merit.

**ORDER**

**AND NOW**, this \_\_\_\_ day of November, 2011, the Defendant and his attorney are notified that it is the intention of the Court to dismiss the Defendant's PCRA petition unless he files an objection to that dismissal within twenty days (20) of today's date.

By the Court,

Nancy L. Butts, President Judge

xc: Ken Osokow, Esq.  
Edward J. Rymysza, Esq.